IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-239

WILLIE STAMPS, JAMES ATKINSON, DARNEY STANFIELD, Individually and On Behalf of All Other Persons Similarly Situated,

Petitioners,

—v.—

DETROIT EDISON COMPANY, Local 223 UTILITY WORKERS UNION OF AMERICA, and Local 17 INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

WILLIAM B. GOULD
Stanford Law School
Stanford, California 94305

JOHN DE J. PEMBERTON, JR.
University of
San Francisco Law School
San Francisco, California 94117

MELVIN L. WULF
American Civil Liberties
Union Foundation
22 East 40th Street
New York, N. Y. 10016

Attorneys for Petitioners

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DETROIT EDISON COMPANY, Local 223 UTILITY WORKERS UNION OF AMERICA, and Local 17 INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,

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Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this action on March 11, 1975, as modified on petition for rehearing on May 16, 1975.

OPINIONS BELOW

The opinion for the Sixth Circuit, as modified, is reported at 515 F.2d 301 and is set out in the Appendix, infra, pp. 93a-117a The opinion of the District Court for the Eastern District of Michigan together with its findings, conclusions and order, is reported at 365 F.Supp. 87 and is set out in the Appendix, infra, pp. 1a-92a.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on March 11, 1973, and was modified by that Court's order on petition for rehearing entered on May 16, 1975. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Punitive Damages. Findings of the District Court, undisturbed upon appeal, establish that petitioners and the members of their class were victims of employment discrimination accompanied by such callousness and intransigence as to compel an inference of malice on the part of two of the three defendants.

   a. Was the District Court's award of punitive damages reversible on the ground that such damages are not authorized by the provisions of the Civil Rights Act of 1866, 42 U.S.C. §§ 1981, 1988, in an action in which

the plaintiffs joined a claim under that Act with one under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e - 2000e-17 (1972 Supp.)?

b. Should the judgment of the Court of Appeals reversing the District Court's award on the ground that such damages are not authorized be summarily vacated in the light of Johnson v. Railway Express Co., __U.S.__, 95 S. Ct. 1716 (May 19, 1975)?

2. The Showing Required for Individual Entitlement to Back Pay. Prohibited employment discrimination was found by the District Court, and these findings were affirmed on appeal, inter alia, in conduct which rendered futile any application for or expression of interest in transfer into the employer's high opportunity jobs, and even precluded members of the victim class from having knowledge of the existence of vacancies or the prospect of improvement by transfer. Must members of that class, in order to establish their individual entitlement to back pay, carry the burden:

a. Of showing that each applied for or "indicated a desire to transfer to" a particular vacant job during the period of liability for back pay (January 11, 1968 to March 22, 1974); and

b. Of showing that that job was subsequently filled by someone no better qualified than he?

STATUTORY PROVISIONS INVOLVED

The right to contract, and the remedy, provisions of Sections 1 and 3 of the Civil Rights Act of 1866, which provisions are codified as 42 U.S.C. §§ 1981 and 1988 (1970).

The prohibition of discrimination by employers (in Section 703(a)), and the remedy provision (in Section 706(g)), of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e-2(a) and 2000e-5(g)(1972 Supp.)

These provisions are set out in the Appendix, infra, pp. 118a et seq.

STATEMENT OF THE CASE

Petitioners brought this class action in May, 1971, seeking relief from employment discrimination on the part of Detroit Edison Company and two unions representing some of its employees. Their claims were based upon (1) Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e-2000e-17(1970),1/ (2) Section 1 of the Civil Rights Act of 1866, 42 U.S.C. §1981 (1970), and (3) Sections 1 and 301 of the National Labor

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1. In furtherance of their Title VII claims, petitioners had previously resorted to the Michigan Civil Rights Commission and the Equal Employment Opportunity Commission, as required by Section 706 of the 1964 Act, 42, U.S.C. §2000e-5 (1970).

Relations Act, as amended, 29 U.S.C. §§ 151 and 185 (1970). The District Court's jurisdiction rested upon 28 U.S.C. §§ 1331, 1343, and 2201, and 42 U.S.C. § 2000e-5(1970). In June, 1972, the United States 2/ commenced an action against the same defendants, under Section 707 of the 1964 Act, 42 U.S.C. § 2000e-6 (1972 Supp.), similarly seeking to remedy employment discrimination, and the two actions were later consolidated.

After a three month trial resulting in extensive findings of pervasive racial discrimination in employment, a decree was entered on October 2, 1973, enjoining practices found to discriminate and ordering affirmative relief which included awards of back pay and punitive damages. On appeal, the District Court's findings of fact were left undisturbed, but the decree was reversed and the case remanded for extensive modification of the decree's affirmative provisions. Specifically, the judgment of the Sixth Circuit reversed the award of punitive damages as unauthorized by the statutes invoked, narrowed the class entitled to relief to black employees and rejected applicants (excluding blacks deterred from applying by defendant's reputation for discrimination), limited entitlement to back pay by application of Michigan's three-year statute of limitations,

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2. After responsibility for government litigation under Section 707 was transferred to the EEOC under Section 707 (c) and (d), the Commission was substituted as party plaintiff.

redefined the showing required to establish individual entitlement to back pay, altered the seniority provisions of the Decree with respect to rejected applicants, and "recast" other provisions "for greater precision and clarity." App., infra, p. 110. The Order of May 16, 1975, modifying the original opinion, redefined the effect of the application of the three-year statute of limitations and redefined the showing required for entitlement to back pay.

The District Court's findings of fact, affirmed on appeal, establish that the Company's violations were manifested not only by exceptionally egregious statistical patterns (Findings Nos. 16-25, 30; App., infra, pp. 27a-33a, 36a). but by hiring, placement and promotion practices, long-established as discriminatory, continuing long after the effective date of the 1964 Act and sometimes up to the time of trial. These practices included, as to hiring, the use of racial coding of applications (Finding No. 8; App., infra, pp. 22a-23a). and reliance upon referrals from a predominantly white work-force (Finding No. 28; App., infra, p. 34a), and as to placement and advancement as well as initial hiring decisions, the use of unvalidated testing (Findings Nos. 31-45; App., infra, pp. 36a-44a) and an otherwise largely unguided discretion in supervisors, who were virtually all white (Findings Nos. 29, 49; App., infra, pp.34a-35a, 56a-58a). Although it had been the Company's practice for most high opportunity jobs (such as mechanic, power-plant operator and electrician) to employ unskilled persons whom it trained through apprenticeship and training programs

(Finding No. 50; App., infra, p. 50a, 54a-55a), few blacks were employed in these categories, and even during 1968-1970 when the Company was hiring in greatest numbers and hiring substantially more blacks than ever before, few blacks were placed in the high opportunity lines of progression. (App., infra, p. 54a; Govt. Ex. 65). A departmental seniority system, required by union contract as to bargaining unit positions and by Company directive as to the substantial numbers of positions not within a bargaining unit, blocked the transfer of the large number of blacks assigned to positions in low opportunity lines (such as janitor, porter, wall-washer, elevator operator and plant cleaner) into these high opportunity ones. (Findings Nos. 5, 15, 46-50, Conclusion No. 8; App., infra, pp. 21a, 27a, 44a-48a, 69a-70a). In fact, by limited, intra-departmental posting of vacancies, this system prevented these blacks from even knowing of most opportunities arising in the high opportunity lines. (Findings Nos. 46-50; App., infra, pp. 44a-48a).

The frustrating experiences of many individual blacks, occasioned by these practices, were alluded to in the Findings on the basis of the testimony of some of them at trial. (Findings Nos. 11-13; App., infra, pp. 24a-26a). These included the rejection of applicants because they applied for positions commensurate with their skills and experience (Finding No. 13; App., infra, p. 21a)3/ , and the denial of trans-

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3. Thus, petitioner Stamps, after several rejections, was finally hired on the day following

fers with sometimes candid allusion to racial reasons (Findings Nos. 11-12; App., infra, pp. 24a-25a). Often less qualified whites were preferred to better qualified blacks. (Finding No. 10; App., infra, p. 24a, 55a (Gov't. Exh. 14 and 15)). Attempts by blacks to bring their grievances to the attention of management were rebuffed. (Finding No. 54; App., infra, p. 50a). The defendants' reputation for discrimination discouraged not only applications for employment, but efforts to seek placement in or transfer to high opportunity lines as well.

The District Court's summary of its findings, as quoted by the Court of Appeals (App., infra, p. 97a) recited in part:

> The evidence was overwhelming that invidious racial discrimination in employment practices permeates the corporate entity of the Detroit Edison Company. The Court finds as proven facts that upward mobility of blacks presently employed at Detroit Edison is almost non-existent, and that qualified black employees are refused employment or refrain from applying for

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(Footnote 3 continued)

his last rejection when, on the advice of a friend, he applied for a job as a janitor instead of as a laborer in the Construction Department.

> employment because of the Company's reputation in the Black Detroit Community for racial discrimination...
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> ... the Unions have promoted the interests of its white members without regard to the interests of its black members, and have ignored the plight of the black members in gaining the equal employment opportunity that is their due under the Constitution and laws of the United States.

Although the Court of Appeals sustained the findings of violation, and affirmed (and refused to stay pending appeal) the injunctive and prospective relief granted by the District Court, it limited the relief awarded for discrimination already suffered in two significant respects, both of which warrant review by this Court:

1. The Court of Appeals held that not even the 1866 Civil Rights Act, when the action it authorizes "is joined with another statutory right of action such as Title VII [of the 1964 Civil Rights Act]..." permits relief by way of punitive damages. (App., infra, p. 100a).

2. While affirmingthe award of back pay, as modified (with respect to definition of the affected class and application of a statute of limitations), the Court of Appeals held that individual members of the affected class (rejected black

> applicants and black present and former employees) would carry a burden of proof in proceedings to establish individual entitlement essentially identical to that borne by a plaintiff in an individual employment discrimination action who was seeking to prove violation in the first instance. Specifically, the Court imposed upon individual members of the class (or victims of proven violations in this case) the burden of showing that each applied for or "indicated a desire to transfer to a vacant jobs", was qualified for it, and that after his rejection "the position was filled by someone possessing the qualifications of the applicant or someone less qualified." Only after such a showing will the defendant have a burden of proving "that the rejection or failure to transfer was not racially motivated." App., infra, p. 114a.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals erred in holding punitive damages unauthorized by the 1866 Civil Rights Act.

The holding by the Court of Appeals that violation of the 366 Act, 42 U.S.C. §§ 1981, 1988, could not be the basis for an award of punitive damages, was bottomed on petitioners' joinder of

their §1981 action with one based on Title VII. App., infra, p. 100a. That holding conflicts with decisions of this Court, Johnson v. Railway Express Company, __U.S.__, 95 S.Ct. 1716 (May 19, 1975), and of other Courts of Appeals, 4/ that the two causes of action are wholly independent. In fact, the remedies provided by the Thirty-Ninth Congress for violations of what is now 42 U.S.C. § 1981 extend not only to all those which are in "in conformity with the laws of the United States, so far as... suitable... "; they include as well all "suitable remedies" provided by "the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction" sits. 42 U.S.C. § 1988 (1970), 14 Stat. 27 (1866). 5/ As this Court noted in

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4. Young v. International Telephone & Telegraph Co., 438 F.2d 757 (3rd Cir. 1971); Brown v. Gaston County Dyeing Machine Co., 457 F.2d 1377 (4th Cir. 1972), cert. denied, 409 U.S. 982 (1972); Caldwell v. National Brewing Co., 443 F.2d 1044 (5th Cir. 1971), cert. denied, 405 U.S. 916 (1972); Brady v. Bristol-Meyers, Inc., 459 F.2d 621 (8th Cir. 1972); Macklin v. Spector Freight Systems, 478 F.2d 979 (D.C. Cir. 1973). But see Waters v. Wisconsin Steel Works, 427 F.2d 476 (7th Cir. 1970), cert. denied, 400 U.S. 911 (1970). See also, Johnson v. Railway Express Agency, Inc., 489 F.2d 525(6th Cir. 1973), affd., __U.S.__, 95 S.Ct. 1716 (May 19, 1975).

5. Decisions applying §1988 have found warrant for punitive damages in federal law, and the award has been sustained even where state law normally would not allow punitive damages. See, e.g., Caperci v. Huntoon, 397 F.2d 799 (1st Cir. 1968).

Johnson, supra, "An individual who establishes a cause of action under § 1981 is entitled to both equitable and legal remedies, including. . . under certain circumstances, punitive damages." 95 S.Ct. at 1720 (citations omitted).

II. The Court of Appeals imposed an improper burden of proof upon the individual back pay claimant.

Even as modified upon petition for rehearing, the holding of the Court of Appeals imposes a burden of proof on members of the victim class that puts its rule in conflict with the decisions of other Courts of Appeals on the same matter. 6/ Moreover, its holding, in light of the nature of the violations found, tends to defeat the "'make whole' purpose of Title VII", Albemarle Paper Co. v. Moody, ___U.S. ___, 95 S.Ct.2362, 2372 (June 25, 1975), and misinterprets and misapplies this Court's statement as to burden of proof in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1972). 7/

1. The required showing that the claimant "indicated a desire to transfer to a vacant job."

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6. Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974); Bowe v. Colgate-Palmolive Co., 489 F.2d 896 (7th Cir. 1973).

7. See also Albemarle Paper Co. v. Moody, ___ U.S. ___, 95 S.Ct. 2362, 2375 (June 25, 1975).

In the present case Detroit Edison Company has been found to have denied blacks equal opportunity, inter alia, by discouraging and refusing placement and transfer into high opportunity jobs into which similarly qualified whites were regularly placed. It is responsible for circumstances in which incumbent black employees would not know of most vacancies o curring in high opportunity lines and would not think it reasonable to aspire to them, if they did. The union defendants have participated in this violation by adhering to contract provisions which abet its effect. One of them has been found to have deceitfully discouraged black grievances over transfer opportunities and to have participated in gerrymandering seniority districts to defeat black transfer opportunities. (Finding No. 51; App., infra, pp.49a-50a, 66a-67a). The limited job posting system and the occupational seniority system affected transfer opportunities (and knowledge of vacancies) both within the bargaining unit and with respect to many jobs outside of it. If, to be "made whole" for past deprivation of this opportunity, a member of the victim class must show that "he indicated a desire to transfer to a vacant job," the defendant's system -- relying as it did upon discouragement and ignorance -- will have in most instances effectively insulated itself from all but prospective remedy.

We believe that the impossible burden which the Court of Appeals has imposed resulted from a misapplication of this Court's statement in McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 802 (1973), which the Court below quoted in its

order of May 16, 1975. The issue addressed by the McDonnell-Douglas statement concerned an individual plaintiff's burden of proof when seeking to establish that a violation has occurred. By contrast, the issue being addressed in the present case concerns the defendant's obligation to make the victims of its discrimination whole, after a violation has been proved. No question remains in this case as to whether individuals have been injured by the law's violation; violation and the fact of injury to a victim class has been established. The questions remaining concern merely who within the class are entitled to restitution and how much each needs to be made whole. On these questions, as the Court of Appeals for the Fifth Circuit has said in Pettway v. American Cast Iron Pipe Co., 494 F. 2d 211, 259-260 (1974), as between the employer and the victim of discrimination, it is proper that any uncertainties be resolved against the employer.

Perhaps the clearest measure of the conflict between the holding below and those of other circuits is the contrasting statement in Baxter v. Savannah Sugar Refining Co., 495 F.2d 437, 444-445 (5th Cir. 1974), that "the initial burden will be on the individual discriminatee to show that he was available for promotion and possessed the general qualifications which are shown by Savannah to be possessed by the higher paid white employees and are job related." Then, the "employer must demonstrate by clear and convincing evidence that any particular employee would never have been advanced because of that individual's particular lack of qualifications

for a more difficult position or for other good and sufficient reasons such employee would never have been promoted." 8/

2. The required showing that "the position was filled by someone possessing the qualifications of the applicant or someone less qualified." For the reasons just mentioned, a required showing of comparability of qualifications with those of a white placed in a particular job will likewise defeat the remedial and restitutionary purposes of the back pay award. The victim class here consists of individuals who were, by virtue of the violations found, kept in ignorance of vacancies in positions which their experience and the employer's reputation foreclosed them from considering.9/ Evidence from random surveys warranted a finding that many whites in the

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8. See also, Bowe v. Colgate-Palmolive Co., 489 F.2d 896, 903 (7th Cir. 1973).

9. The individual plaintiffs and class members who testified often demonstrated that they were not defeated by the system's discouragement of transfer and concealment of transfer opportunities. But the larger number of class members will not have persisted, in the face of these factors, to overcome obstacles which no white employee placed in these desirable jobs was required to overcome. Cf. United States v. Local 36, Sheet Metal Workers Intl. Assn., 416 F.2d 123, 132 (8th Cir. 1969).

better jobs possessed inferior qualifications to those of blacks in lower jobs (Finding No. 10; App., infra, p.24a). However, in circumstances where, as the Court of Appeals noted, it "will obviously be impossible to reconstruct the employment history of each black employee. . . as it would have been if that person had not been subjected to discrimination" (App., infra, p. 111a), the victim is required to participate in a game of chance by being made to compare his qualifications with those of a particular white. The Court has wrongly determined to resolve uncertainties against the victim rather than the wrong-doer. Here, again, we submit that the conflict between the Court's holding and the better-reasoned, we believe, conclusions of other Courts of Appeals, warrants resolution by this Court.

CONCLUSION

For the reasons stated, the Writ of Certiorari should be granted.

Respectfully submitted,

WILLIAM B. GOULD
Stanford Law School
Stanford, California 94305

JOHN de J. PEMBERTON, Jr.
University of San Francisco
Law School
San Francisco, California
94117

MELVIN L. WULF
American Civil Liberties
Union Foundation
22 East 40th Street
New York, New York 10016

Attorneys for Petitioners

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